IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE R.BASANT

THURSDAY, THE 4TH JANUARY 2007 / 14TH POUSHA 1928

Crl.MC.No. 3997 of 2006()

STC.620/2006 of JUDL. MAGISTRATE OF FIRST CLASS, KASARAGOD

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PETITIONER: ACCUSED 2-19, 21 AND 22:

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1. K. VAIRAMUDIGOWDA,
   PRESIDENT, MANDYA MILK UNION, KRISHNA NAGAR,
   PANDAVAPURA TOWN, MANDYA DISTRICT.

2. S. SUNDARAM,
   MANAGING DIRECTOR, MANDYA MILK UNION,
   GAJJALAGERE-571 428, MADDUR TALUK, MANDYA DISTRICT

3. CHANNIGEGOWDA,
   DIRECTOR, MANDYA MILK UNION, GUDEHOSAHALLI,
   UGEENAHALLI P.O., KIKKERI HOBLI, K.R.PET TALUK,
   MADYA DISTRICT.

4. JAVAREGOWDA,
   DIRECTOR, MANDYA MILK UNION, # 1636:1,
   2ND MAIN ROAD, UPINAKERI, MANDI MOHALA, MYSORE.

5. N. RAJU,
   DIRECTOR, MANDYA MILK UNION, 2ND CROSS,
   KARASAVADI ROAD, HOSAHALLI EXTENSION,
   MANDYA-571401.

6. T. PUTTASWAMY GOWDA,
   DIRECTOR, MANDYA MILK UNION, CHIKKAMALIGA, KOPPALU
   KALKUNI P.O., MALAVALLI TALUK, MANDYA DISTRICT.

7. S.C.RAMACHANDRA,
   DIRECTOR, MANDYA MILK UNION, SRI.RAGHURAMAPURA,
   NAGAMANGALA TALUK, MANDYA DISTRICT.

8. H.J. CHANDRU,
   DIRECTOR, MANDYA MILK UNION, B.HOSAHALLI,
   GOPALAPURA P.O., MANDYA-571402.

9. H.C.SHIVARAMU,
DIRECTOR, MANDYA MILK UNION, HOLALU (POST),
DUDDA HOBLI, MANDYA TALUK, MANDYA.

10. A.C. SATHISH,
DIRECTOR, MANDYA MILK UNION, ANNUR,
C.A.KERE HOBLI, MADDUR TALUK, MANDYA.

11. M.B. HARISH,
DIRECTOR, MANDYA MILK UNION, HOSAKOTE,
MADUVINAKODI POST, K.R.PET TALUK, MANDYA DISTRICT.

12. THAMMALAH,
DIRECTOR, MANDYA MILK UNION, CHIKKONAHALLI,
KEELANGHATTA POST, K.R.PET TALUK, MANDYA DISTRICT.

13. B. BOREGOWDA,
DIRECTOR, MANDYA MILK UNION, M.SHETTAHALLI,
K.SHETTAHALLI HOBLI, SRIRANGAPATNA TALUK,
MANDYA DISTRICT.

14. B.RANGASWAMY,
DIRECTOR, MANDYA MILK UNION, LAXMISAGARA,
MELUKOTE HOBLI, PANDAVAPURA TALUK, MANDYA DISTRICT

15. H.P. PREMA,
DIRECTOR, MANDYA MILK UNION, HANAKERE,
MANDYA TALUK, MANDYA DISTRICT.

16. KUMARA KOPPA,
DIRECTOR, MANDYA MILK UNION, KOPPA GRAMA,
MADDUR TALUK, MANDYA DISTRICT.

17. HIMAVANTHA GOPAL,
DIRECTOR, MANDYA MILK UNION, JOINT REGISTRAR OF
CO-OP.SOCIETIES, MYSORE REGION, MYSORE.

18. P. SRINIVAS,
DIRECTOR, MANDYA MILK UNION, DY.DIRECTOR OF
ANIMAL HUSBANDRY & SERVICES, D.C.OFFICE COMPOUND,
MANDYA.

19. M.G. SREEKANTARADHYA,
DIRECTOR, MANDYA MILK UNION, NATIONAL DIARY
DEVELOPMENT BOARD (NDDB), CHAMARAJA MOHALA,
D. SUBBAIAH ROAD, MYSORE.

20. MANDYA DISTRICT CO-OPERATIVE MILK
PRODUCERS SOCIETIES UNION LTD., GEJJALAGERE-571428
MADUR TALUK, MANDYA DISTRICT, KARNATAKA.

BY ADV. SRI.M.K.SUMOD
SRI.KAUSER EDAPPAGATH
SRI.P.K.MOHAMED JAMEEL
SMT.A.LOWSY
SMT.N.SHAMNA

RESPONDENTS: COMPLAINANT AND STATE:
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1. THE FOOD INSPECTOR,
KASARGODE CIRCLE, KANNUR.

2. THE STATE OF KRRALA,
REPRESENTED BY PUBLIC PROSECUTOR,
HIGH COURT OF KERALA, ERNAKULAM.

BY PUBLIC PROSECUTOR SRI. K.A.AKBAR
SRI.N.NANDAKUMARA MENON(AMICUS CURIAE)

THIS CRIMINAL MISC. CASE HAVING COME UP FOR ADMISSION ON 04/01/2007, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

R.BASANT, J

Crl.M.C.No.3997 of 2006

Dated this the 4th day of January, 2007

ORDER

Does the decision in **Coromandal Distributors v. Food Inspector** [1998(2) KLT 657] represent the correct concurrent law ? What is the course to be followed by a Magistrate when the second sample is returned by the Director of the Central Food Laboratory with a report that the sample is unfit for analysis ? Does the report of the Public Analyst get superseded under Section 13(3) of the Prevention of Food Adulteration Act (hereinafter referred to as `the Act') when such a report is received ? These questions do arise for consideration.

2. The petitioners face indictment in a prosecution for sale of adulterated milk powder under the provisions of the Prevention of Food Adulteration Act. Accused No.1 (not a petitioner) is alleged to have sold milk powder allegedly manufactured by accused No.22. 2nd accused is the President, 3rd accused is the Managing Director and accused 4 to 21 are Directors of accused No.22, a Co-operative Societies Union in the State of Karnataka.

3. The Public Analyst found the sample to be adulterated. The petitioners wanted the second sample retained by the Local Health authority to be sent for analysis to the Central Food

Laboratory (C.F.L). The second sample was forwarded by the Court to the C.F.L. The C.F.L submitted a report informing the Court that the sample is unfit for analysis. Therefore analysis could not be conducted. On receipt of that report, the learned Magistrate decided to proceed further with the matter. The personal presence of the petitioner was insisted. Application filed for exemption under Section 205 Cr.P.C was rejected. It is in these circumstances that the petitioners have come to this Court for quashing of proceedings invoking the powers under Section 482 Cr.P.C.

4. Various contentions have been raised by the learned counsel for the petitioners. The learned Public Prosecutor was heard. Sri.N.Nandakumara Menon, Advocate was requested to assist this Court as Amicus Curiae. All counsel have been heard.

5. The first contention raised is that the report of the Director of C.F.L supersedes the report of the Public Analyst and therefore the proceedings are liable to be quashed. In as much as the decision in **K.M.Mathew v. State of Kerala** [1992(1) KLT 1] has been overruled by **Adalath Prasad v. Rooplal Jindal & Ors.** [(2004 SC 4674] the petitioners cannot pray for dropping of proceedings by the learned Magistrate and hence it is for this Court to invoke the powers under Section 482 Cr.P.C and quash the proceedings, it is submitted.

6. The crucial question is whether a report of the Director of C.F.L received by the court informing the court that analysis could not be conducted on account of decomposition/unfitness of the sample for analysis, can be reckoned as the report of the Director of C.F.L contemplated under Section 13(2B) of the Act and consequently whether such certificate would supersede the Public Analyst's report under Section 13 (3) of the Act.

7. I find that the question is squarely covered by a decision of the Supreme Court and there can be no subsisting doubt on that aspect. An intimation by the Director of C.F.L that the article is unfit for analysis on account of decomposition/damage, is certainly not a certificate "specifying the result of analysis" contemplated under Section 13(2B). I extract Section 13(2B) below:

> "13(2B): On receipt of the part or parts of the sample from the Local (Health) Authority under sub-section (2A), the court shall first ascertain that the mark and intact and the signature or thumb impression, as the case may be, is not tampered with, and despatch the part or, as the case may be, one of the parts of the sample under its own seal to **the Director of the Central Food Laboratory** who **shall thereupon send a certificate to the court** in the prescribed form within one month from the date of receipt of the part of the sample **specifying the result of the analysis."**
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> (emphasis supplied)

Only such a certificate can be reckoned as the certificate of the Director of the C.F.L, which specifies "the result of the analysis".

When no such analysis is/could be undertaken, for whatever reasons, the report submitted by the Director of the C.F.L can only be an intimation of the inability of the Director of C.F.L to conduct the analysis and not certainly the certificate of the Director of C.F.L specifying the result of analysis.

8. Section 13(3) of the Act which I extract below, further shows that only the certificate issued by the Director of C.F.L shall supersede the report of the Public Analyst.

> "Section 13(3): **The certificate** issued by the Director of the Central Food Laboratory (under sub-section (2B) **shall supersede** the report given by the public analyst under sub-section (1)."
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> (emphasis supplied)

9. In the instant case, the intimation received by the Court from the Director of C.F.L (produced as Annexure-A2) can hence be reckoned only as a report intimating the inability of the Director of C.F.L to analyse the sample and not as a certificate issued by the Director of C.F.L under Section 13(2B) of the Act. There can hence be no supersession under Section 13(3) of the Act. The question is covered squarely by the decision of the Supreme Court in **Municipal Corporation of Delhi v. Ghisa Ram** [A.I.R 1967 S.C 970], which I extract below:

> "Para.3: In this appeal, the main contention on behalf of the appellant was that, though, under the Act, a certificate of the Director of the Central Food

> Laboratory has the effect of superseding the report of the Public Analyst, the absence of such a certificate for any reason whatsoever will not affect the value and efficacy of the certificate given by the Public Analyst. The proposition put forward on behalf of the appellant appears to be correct. Under S.13(3) of the Act, the certificate issued by the Director of the Central Food Laboratory supersedes the report given by the Public Analyst. The proviso to sub-section (5) of S.13 further lays down that any document purporting to be a certificate signed by the Director of the Central Food Laboratory shall be final and conclusive evidence of the facts stated therein. These provisions of the Act are however, only attracted when, in fact, an analysis of the sample sent to the Director of the Central Food Laboratory is made by him on the basis of which he issues a certificate. **If, for any reason, no certificate is issued, the report given by the public analyst does not cease to be evidence of the facts contained in it and does not become ineffective merely because it could have been superseded by the certificate issued by the Director of the Central Food Laboratory. Further, there being no certificate issued by the Director of the Central Food Laboratory, no question can arise of his certificate becoming final and conclusive evidence of the report contained in it."**
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> (emphasis supplied)

10. That takes me to the interesting next question as to what is the procedure to be followed by the learned Magistrate when the second sample sent to the Director of C.F.L is returned with the endorsement that it is unfit for analysis. A learned Judge of this Court in **Coromandal Distributors v. Food Inspector** [1998(2) KLT 657] had taken the view that in such a situation, the third sample need not

be sent to the C.F.L as contemplated under the proviso to Section 13 (2C) of the Act. I extract Section 13(2C) below:

> "Section 13(2C): Where two parts of the sample have been sent to the court and only one part of the sample has been sent by the court to the Director of the Central Food Laboratory under sub-section (2B), the court shall, as soon as practicable, return the remaining part to the Local (Health) Authority and that Authority shall destroy that part after the certificate from the Director of the Central Food Laboratory has been received by the court:
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> Provided that where the part of the sample sent by the court to the Director of the Central Food Laboratory is **lost or damaged**, the court shall require the Local (Health) Authority to forward the part of the sample, if any, retained by it to the court and on receipt thereof, the court shall proceed in the manner provided in sub-section (2B)."
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> (emphasis supplied)

The learned Judge had taken the view that when an article is returned with the endorsement that it is unfit for analysis, it cannot held to be "lost or damaged", which eventuality alone will attract the operation to proviso to Section 13(2C) of the Act.

11. With great respect, I must mention that this decision was rendered because the decision of the Supreme Court in **Charanji Lal v. State of Punjab** [A.I.R 1984 S.C 80] had not been brought to the notice of the learned Judge. In the said decision, the Supreme Court had considered the question as to whether the expression "lost or damaged" in Section 13(2C) would take within its sweep a case where the article is decomposed and has become unfit for analysis. It is clearly held in para.13 of the said decision, which I extract below that

the expression "lost or damaged" must take in the situation where analysis becomes impossible due to any reason including decomposition".

> "The word "damaged" in the collocation of the words "lost or damaged" - appearing in the proviso to sub-section (2C) of Sec.13 in relation to the part of the sample sent by the Court to the Director of the Central Food Laboratory must, in the context, mean "damaged due to any cause, including decomposition". Thus the certificate of the Director, Central Food Laboratory, that the sample received by him was decomposed and therefore unfit for analysis will enable the Magistrate to proceed in the manner provided in sub-section (2B) ie. forward the remaining part of the sample to the Director, Central Food Laboratory.
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> It would be seen that the phrase "lost or damaged" appears both in sub-section (2) of S.11 and in the proviso to sub-section (2C) of S.13, and these provisions have been inserted by Parliament by Act 34 of 1976 with a definite object. The part of the sample sent by the Court to the Director of the Central Food Laboratory under the proviso to sub-section (2C) of S.13 may be either damaged due to the container not being properly sealed or fastened, or due to various other causes including breakage of the container, or because decomposition has occurred, or it may be lost in transit. The word "damaged" in the collocation of the words "lost or damaged" occurring in sub-sec. 2 of S.11 and in the proviso to sub-section (2C)of S.13 must be construed in furtherance of the object and purpose of inserting these provisions. The whole purpose of depositing two parts of the sample with the Local (Health) Authority is that if one of the parts of the sample is lost or damaged for any reason whatever, the remaining part may still be available for analysis."

12. In these circumstances, the decision in **Coromandal Distributors v. Food Inspector** has got to be held to be per incurium and not laying down the correct law.

13. It follows therefore that the procedure adopted by the learned Magistrate of straight away proceeding with the prosecution even after getting a report from the Director of C.F.L that the article is unfit for analysis is incorrect and improper. The learned Magistrate must certainly proceed under the proviso to Section 13(2C) of the Act. In not having done the same, the learned Magistrate has committed an irregularity/impropriety which calls for interference by this Court in this Crl.M.C. The learned Magistrate must be directed to resort to the proviso to Section 13(2C) of the Act.

14. It is contended that no useful purpose will be served if the third sample is now sent for analysis. I will not hazard an opinion or hypothesis on that aspect. The Director of C.F.L must be directed to get the third sample analysed and report the result of such analysis to the court under the proviso to Section 13(2C) of the Act. If the report reveals that the sample is not adulterated, of course, that will be the end of the proceedings. If not, proceedings may have to continue.

15. It is contended that in such event, it would amount to denial of the valuable right of the accused under Section 13(2) of the Act. That question cannot and need not be considered by this Court in this proceedings under Section 482 Cr.P.C. It will certainly have to be considered by the court in the facts and circumstances of each case, whether there is denial/deprivation of the right of the accused under Section 13(2C) of the Act and needless to say, if the court finds that

there has been such denial, the accused will be entitled to the benefit arising therefrom.

16. Yet another interesting contention has been raised by the learned counsel for the petitioners. He contends that, at any rate, some of the accused are alleged to be only the Directors of the 22nd accused, a Co-operative Society. Relying on Section 17(1) (a)(ii) of the Act, the learned counsel for the petitioners contends that cognizance should not have been taken against those accused persons. The decision in **S.M.S Pharmaceuticals Ltd. v. Neeta Bhalla** [(2005) 8 SCC 89] also does become relevant in this context. I am of opinion that it is not necessary for this Court to record any finding on that aspect. Suffice it to say that after receipt of the report of the Director of C.F.L, if necessary, the learned Magistrate must consider whether it is necessary to issue summons to all the accused persons including mere Directors against whom, no other specific allegations are raised. I need only direct that the learned Magistrate should consider the question afresh before proceeding further with the matter after receipt of the certificate of the Director of the C.F.L under the proviso to Section 13(2C) of the Act. Proceedings shall continue against the petitioners only after the learned Magistrate takes a fresh decision to that effect thereafter. This shall be so notwithstanding the fact that the learned Magistrate has now issued summons to the petitioners. The question shall be considered afresh

if after receipt of the report of the C.F.L the learned Magistrate is satisfied that the matter deserves to be further proceeded with.

17. The learned counsel for the petitioners further submits that unnecessarily insistence is made on the personal presence of the accused persons. It is by now trite that ritualistic and mechanical insistence on the personal appearance of the accused persons should not be made by a criminal court. I need only observe that if after receipt of the further report from the Director of the C.F.L the learned Magistrate chooses to proceed further against any of the petitioners, such petitioners shall be at liberty to make fresh application for exemption which the learned Magistrate must consider afresh in accordance with law.

18. In the result, this Crl.M.C is allowed in part. The learned Magistrate is directed to secure the report under the proviso to Section 13(2C) of the Act and proceed further thereafter in accordance with law and as directed above.

19. There can be no doubt in view of Section 13(2D) of the Act that proceedings against the petitioners cannot continue at any rate till the certificate of the Director of the C.F.L is received under the proviso to Section 13(2C) of the Act. No action shall be taken against the petitioners till then and if on the basis of the report of the C.F.L further proceedings be found to be necessary, the learned Magistrate shall consider afresh whether process need be issued against all or

any of the accused persons and whether the personal appearance of all those persons need be insisted.

(R.BASANT, JUDGE)

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